IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 04-30567

ROBERT L. ELLIS, JR.

Debtor

A. THOMAS MONCERET

Plaintiff

v. Adv. Proc. No. 04-3102

ROBERT L. ELLIS, JR.

Defendant

M E M O R A N D U M

APPEARANCES: ROBIN S. KUYKENDALL, ESQ.
Post Office Box 5676
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Attorney for Plaintiff

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Attorney for Defendant/Debtor

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff, A. Thomas Monceret, on May 14, 2004, seeking a determination by the court that an award of $3,000.00 granted him pursuant to a modification of the final judgment for divorce between the Debtor and his former spouse is nondischargeable under 11 U.S.C.A. § 523(a)(5) (West 2004), as being in the nature of alimony or support.

The trial of this adversary proceeding was held on January 18, 2005. The record before the court consists of seven stipulated exhibits entered into evidence, along with the testimony of the Plaintiff.[1]

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

The Debtor and his former wife, Rhonda Marie Blair Ellis (Ms. Ellis), were divorced pursuant to a Final Decree of Divorce, entered in the Fourth Circuit Court for Knox County, Tennessee (State Court) on October 8, 1996. Incorporated within the Final Decree of Divorce was the Marital Dissolution of Property and Child Support Agreement between the parties, executed on October 8, 1996 (collectively, Final Decree). Under the terms of the Final Decree, Ms. Ellis was awarded sole custody of the Ellis' minor children subject to the agreed upon visitation set forth therein. Ms. Ellis was not awarded alimony under the Final Decree.

On February 23, 2001, the Debtor filed a Petition to Modify a Final Judgment and For Injunctive Relief (Modification Petition) in the State Court, seeking to modify the Final Decree with

[1] The Debtor did not appear; however, his attorney was present and the trial proceeded in his absence.

respect to custody of the Ellis' minor children and child support payments related therewith, along with a temporary restraining order against Ms. Ellis concerning the children's care until a final hearing on custody could be held. On February 26, 2001, the State Court entered a Fiat, restraining Ms. Ellis from taking custody of the Ellis' minor children from the Debtor or interfering with their care and control, but allowing supervised visitation, until the Modification Petition could be heard.

Ms. Ellis, by and through the Plaintiff as her undersigned counsel, filed a Motion to Quash Restraining Order, or in the Alternative, for Visitation on March 15, 2001, arguing that the Debtor falsely and vindictively accused her of inappropriate behavior in order to gain custody of their children. The Debtor then filed a Response to Motion to Quash on June 14, 2001.

The State Court held a hearing on the Modification Petition on August 15, 2001, and pursuant thereto, entered an Order on September 7, 2001, finding that the temporary restraining order was legally issued, but that it should be quashed because the Debtor failed to establish that the children would be immediately and irreparably harmed by remaining in Ms. Ellis' custody. The Order further stated that because the children did not want to remain in Ms. Ellis' custody, the Final Decree should be modified with respect to the children's custody, with each parent alternating weeks. The Debtor and Ms. Ellis later reached an agreement to share residential custody of their minor children.

On March 18, 2002, the Plaintiff filed a Motion for Attorneys Fees in the State Court, seeking an order directing the Debtor to pay his fees for representation of Ms. Ellis in association with the Modification Petition. A hearing on the Plaintiff's Motion for Attorneys Fees was held on November 8, 2002. Pursuant thereto, the State Court entered an Order on December 17, 2003 (December 17, 2003 Order), directing, in material part, as follows:

> IT IS, THEREFOR, ORDERED, ADJUDGED AND DECREED that Robert Lee Ellis, Jr. shall pay to Attorney A. Thomas Monceret, the sum of Three Thousand Dollars and no/100 Dollars ($3000.00) for his representation of the Respondent and the interests of the children in this matter, and as alimony in favor of Rhonda Marie Blair Ellis.

TRIAL EX. 6.

The Debtor filed the Voluntary Petition commencing his Chapter 7 bankruptcy case on February 5, 2004. In his statements and schedules, the Debtor lists the Plaintiff as holding an unsecured nonpriority claim in the amount of $6,000.00. The Plaintiff filed the Amended Complaint[2] initiating this adversary proceeding on May 14, 2004, which the Debtor answered on August 30, 2004.

In the Complaint, the Plaintiff argues that the $3,000.00 attorney's fee (Attorney's Fee) awarded to him and labeled as alimony for Ms. Ellis in the December 17, 2003 Order is nondischargeable under § 523(a)(5) since it is a debt incurred in connection with a divorce decree or other order of the court and is in the nature of alimony or support. The Debtor argues that the Attorney's Fee is dischargeable because it was not incurred in the course of a divorce and because it was awarded to the Plaintiff, a third party, rather than the Debtor's former spouse.

[2] The Plaintiff filed a document entitled "Complaint to Determine Dischargeability of a Debt" in the Debtor's underlying Chapter 7 bankruptcy case on May 14, 2004. That document, which was improperly captioned, was filed without the requisite $150.00 filing fee necessary to commence an adversary proceeding. The court entered an Order on May 18, 2004, directing the Plaintiff to amend his complaint, pay the filing fee, and comply with Part VII of the Federal Rules of Bankruptcy Procedure. The Order further directed that, upon compliance with the court's directives, the Amended Complaint be docketed as an adversary proceeding filed on May 14, 2004.

II

At issue is the Plaintiff's request for a determination that the Attorney's Fee awarded to him pursuant to the December 17, 2003 Order is a nondischargeable judgment owed by the Debtor. The nondischargeability of debts is governed by 11 U.S.C.A. § 523, which provides, in material part:

> (a) A discharge under section 727[3] . . . of this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> > (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—
> >
> > > (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . .; or
> > >
> > > (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support[.]

11 U.S.C.A. § 523(a)(5). The scope of § 523(a)(5) clearly encompasses not only divorces, separations, child support, and custody disputes addressed by court order, but also includes any modifications thereto. *See, e.g., Zaino v. Zaino (In re Zaino),* 316 B.R. 1 (Bankr. D.R.I. 2004) (holding that an amended judgment for divorce and alimony was a nondischargeable § 523(a)(5) debt); *Silverstein v. Glazer (In re Silverstein),* 186 B.R. 85 (Bankr. W.D. Tenn. 1995) (finding that a modified child support judgment was nondischargeable under § 523(a)(5)).

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[3] Chapter 7 debtors receive a discharge of pre-petition debts, "[e]xcept as provided in section 523 of this title[.]" 11 U.S.C.A. § 727(b) (West 2004). This accomplishes the goals of Chapter 7 to relieve "honest but unfortunate" debtors of their debts and allow them a "fresh start" through this discharge. *In re Krohn,* 886 F.2d 123, 125 (6th Cir. 1989) (citing *Local Loan Co. v. Hunt,* 54 S. Ct. 695, 699 (1934)). The Debtor's Discharge Order was entered on July 15, 2004.

Although § 523(a) actions are generally construed strictly in favor of debtors, in order to promote Congressional policies favoring the enforcement of spousal and child support obligations, proof in § 523(a)(5) actions is strictly construed in favor of any former spouses and/or children. *See Hanjora v. Hanjora (In re Hanjora),* 276 B.R. 822, 825 (Bankr. N.D. Ohio 2001) (stating that § 523(a) "implements the general bankruptcy policy of favoring domestic support obligations over the debtor's need for a fresh start"); *Rouse v. Rouse (In re Rouse),* 212 B.R. 885, 887 (Bankr. E.D. Tenn. 1997) (noting that although exceptions to discharge are usually narrowly construed against creditors, § 523(a)(5) is an exception). Nevertheless, the Plaintiff, as the party seeking a determination that a debt is nondischargeable under § 523(a), bears the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991).

III

The Plaintiff argues that the Attorney's Fee awarded in the December 17, 2003 Order is nondischargeable under § 523(a)(5). The Debtor may discharge an award labeled as alimony if it is not actually in the nature of support, and so, the bankruptcy court must inquire into the intentions of the State Court when it made the award. *See Long v. Calhoun (In re Calhoun),* 715 F.2d 1103, 1107-08 (6th Cir. 1983) (holding that whether a debt constitutes alimony under § 523(a)(5) is a matter of federal law, but because these issues fall "within the exclusive domain of the state courts[,]" the bankruptcy court should also rely on state law to make its finding). Within the Sixth Circuit, courts employ the following three-part test to decipher whether alimony is actually in the nature thereof: (1) whether the award was intended to be support; (2) whether the award was effectively support in light of the recipient non-debtor's present needs; and (3) whether the award was "manifestly unreasonable under traditional concepts of support." *Calhoun*, 715 F.2d at 1109-1110.

In making this determination, if the state court has identified an award as alimony, the sole question before the bankruptcy court is "whether something denominated as alimony is really alimony and not, for example, a property settlement in disguise." *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 521 (6th Cir. 1993). Furthermore, a state court's designation of an award as alimony should be presumed to be such by the bankruptcy court, and the bankruptcy court should "look[] to the structure of an obligation only to determine whether it is in the nature of support." *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 403 (6th Cir. 1998).

Because the December 17, 2003 Order states that the Debtor is to pay the Attorney's Fee as alimony, the court must first examine state law to determine if the award is actually support and nondischargeable under § 523(a)(5). Alimony is awarded by Tennessee courts to assist a disadvantaged spouse become self-sufficient and mitigate the "harsh economic realities of divorce." *Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1999). When awarding alimony, the most important factor to be considered by the trial court is the need of the spouse receiving the award, followed next by the ability of the obligated spouse to pay the award. *Houghland v. Houghland*, 844 S.W.2d 619, 621 (Tenn. Ct. App. 1992). Relevant factors to be considered by the trial court include, among others, relative earning capacity, relative education and training, the health of each party, the duration of the marriage, the parties' separate assets, the division of marital property, the standard of living established during the marriage, the relative fault of the parties to the divorce, and any other factors "as are necessary to consider the equities between the parties." *See* TENN. CODE ANN. § 36-5-101(d)(1)(E) (2001 & Supp. 2004); *Robertson v. Robertson*, 76 S.W.3d 337, 340-41 (Tenn. 2002).

With respect to § 523(a)(5), awards of attorneys' fees in domestic cases are generally deemed to be in the nature of support and nondischargeable. *See, e.g., Macy v. Macy*, 114 F.3d 1, 2-3 (1st Cir.

1997) (holding that attorney's fees incurred to enforce support-related orders are nondischargeable); *Jones v. Jones (In re Jones)*, 9 F.3d 878, 882 (10th Cir. 1993) (holding that attorney's fees awarded in post-divorce custody dispute are nondischargeable); *accord McNamara v. Ficarra (In re McNamara)*, 275 B.R. 832, 835 n.2 (E.D. Mich. 2002); *Beggs v. Niewdach (In re Beggs)*, 314 B.R. 401, 415 (Bankr. E.D. Ark. 2004); *Goans v. Goans (In re Goans)*, 271 B.R. 528, 534 (Bankr. E.D. Mich. 2001). However, in order to determine the intent of the state trial court, it is necessary to again refer to Tennessee state law.

> Pursuant to the Tennessee Code Annotated,
>
> > [t]he plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

TENN. CODE ANN. § 36-5-103(c) (2001 & Supp. 2004). Accordingly, "[a]n award of attorney's fees in divorce cases is treated as a form of spousal support, and the award is characterized as alimony *in solido*." *Wilder v. Wilder*, 66 S.W.3d 892, 894 (Tenn. Ct. App. 2001); *see also Fulbright v. Fulbright*, 64 S.W.3d 359, 369 (Tenn. Ct. App. 2001); *Koja v. Koja*, 42 S.W.3d 94, 98 (Tenn. Ct. App. 2000).

When determining whether to award attorneys' fees, the state court again considers the factors set forth in Tennessee Code Annotated section 36-5-101(d)(1). *Lindsey v. Lindsey*, 976 S.W.2d 175, 181 (Tenn. Ct. App. 1997); *Houghland*, 844 S.W.2d at 623. It is within the sound discretion of the trial court to make the award; however, a spouse with "adequate property and income is not entitled to an award of additional alimony to compensate for attorney's fees and expenses." *Lindsey*, 976 S.W.2d at 181. Although the courts have held that such awards are only appropriate when the spouse seeking

fees does not have sufficient funds to pay their own legal expenses or requiring payment would deplete their resources, if that party has been awarded "additional funds for maintenance and support and such funds are intended to provide the party with a source of future income, the party need not be required to pay legal expenses by using assets that will provide for future income." *Koja*, 42 S.W.3d at 98.

Furthermore, "[p]ayments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable." *Calhoun*, 715 F.2d at 1107; *Crawford v. Osborne (In re Osborne)*, 262 B.R. 435, 440 (Bankr. E.D. Tenn. 2001). In fact, many courts have held that even though awards of attorneys' fees were made directly to the actual attorneys, the awards were nonetheless nondischargeable pursuant to § 523(a)(5). *See, e.g., Holliday v. Kline (In re Kline)*, 65 F.3d 749, 750-51 (8th Cir. 1995); *Zaino*, 316 B.R. at 8; *Turner v. Whitney (In re Whitney)*, 265 B.R. 1, 2 n.2 (Bankr. D. Me. 2001); *Goans*, 271 B.R. at 531, 534; *Baker v. Baker (In re Baker)*, 274 B.R. 176, 187 (Bankr. D.S.C. 2000); *Brasslett v. Brasslett (In re Brasslett)*, 233 B.R. 177, 188 n.21 (Bankr. D. Me. 1999).

In Tennessee, it is common practice for the state courts to award attorneys' fees directly to the attorneys themselves in domestic matters. *See Palmer v. Palmer*, 562 S.W.2d 833, 839 (Tenn. Ct. App. 1977) ("In practice such 'additional alimony' is frequently designated simply as fee to be paid to the wife's counsel."). However, the *Palmer* court also stated that "the justification and principle are the same; i.e., that money ordered to be paid by the husband to the wife's attorney is additional alimony allowed to the wife." *Palmer*, 562 S.W.2d at 839.

The December 17, 2003 Order expressly labels the Attorney's Fee as alimony. At trial, the Plaintiff testified that Ms. Ellis could not afford to pay the Attorney's Fee at the time it was awarded by the State Court. The Debtor did not offer any evidence to dispute this testimony, nor did he

dispute the fact that judges in Tennessee tend to award attorney's fees as a form of support for the former spouse or child. Furthermore, these awards of attorney's fees are found to be nondischargeable by most bankruptcy courts. Based upon the record before the court, the court agrees that the Attorney's Fee is in the nature of support and is thus nondischargeable pursuant to § 523(a)(5).

A judgment consistent with this Memorandum will be entered.

FILED: January 20, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 04-30567

ROBERT L. ELLIS, JR.

Debtor

A. THOMAS MONCERET

Plaintiff

v. Adv. Proc. No. 04-3102

ROBERT L. ELLIS, JR.

Defendant

J U D G M E N T

For the reasons set forth in the Memorandum filed this date, it is ORDERED, ADJUDGED, and DECREED that the $3,000.00 attorney fee awarded the Plaintiff as "alimony in favor of Rhonda Marie Blair Ellis," the Defendant's former wife, pursuant to the December 17, 2003 Order entered in the Fourth Circuit Court for Knox County, Tennessee, in the matter styled *Robert Lee Ellis, Jr. v. Rhonda Marie Blair Ellis*, Docket No. 69982, is nondischargeable support under 11 U.S.C. § 523(a)(5) (West 2004).

ENTER: January 20, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE